No. 3697

In the United States Circuit Court of Appeals

For the Ninth Circuit

THE UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

J. J. MATTHEWS and MAUDE K. MATTHEWS,
Husband and Wife,
Defendants in Error.

Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

REPLY BRIEF OF PLAINTIFF IN ERROR

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The defendants in error in their brief contend and attempt to show that the United States Shipping Board Emergency Fleet Corporation was a commercial venture; that it was purely a commercial venture on the part of the United States and did not act as a governmental agency. It is the purpose of this brief to review the cases therein cited and to show that the Emergency

Fleet Corporation was nothing if not a governmental agency.

The first case cited is the *Bank of the United States vs. Planters Bank of Georgia,* 9 Wheat. 906, 6 Law Ed. 244, a decision which we do not believe is applicable here, for, in the first place, Congress did not strip itself of its sovereign character when it authorized the United States Shipping Board to create the United States Shipping Board Emergency Fleet Corporation under the Shipping Act of 1916. It did not in any sense become a partner in a trading company—it simply appointed an agent or arm to carry out governmental functions. By Section Eleven, it is provided that the Shipping Board may form under the laws of the District of Columbia, a corporation to carry out the purposes of that Act.

Article I, Section Eight, subdivision 17 of the Constitution of the United States provides that the exclusive jurisdiction over the District of Columbia is granted to Congress.

In *Metropolitan Railway Company v. District of Columbia,* 132 U. S. 1, 33 Law Ed. 231, it is held that the District of Columbia is a mere municipality acting under the laws of Congress for the

purpose of carrying on the civic functions of the seat of government.

> "We are of the opinion that the corporate capacity and corporate liabilities of the District of Columbia remain as before, and that its character as a mere municipal corporation has not been changed. The mode of appointing its officers does not abrogate its character as a municipal body politic. * * * All municipal governments are but agencies of the superior power of the State or government by which they are constituted, and are invested with only such subordinate powers of local legislation and control as the superior Legislature sees fit to confer upon them. The form of those agencies and the mode of appointing officials to execute them are matters of legislative direction."

Under this decision, the District of Columbia is nothing but an agency of the United States. It is not a state and has none of the attributes of a state, much less of a sovereignty.

Under the general incorporation laws of the District of Columbia, 31 Statutes at Large, p. 1285, Sec. 607, Congress provided for the formation of corporations within the District of Columbia, and that they should be capable "of sueing and being sued in any court of law and equity in the district." We have been unable to find any decision

which enlarges the power granted to corporations of the District of Columbia to be sued in any other place than in the District of Columbia. It may be argued that a corporation of the District of Columbia would be classed the same as a state corporation, but the corporation of the District of Columbia is the creation of a municipality and we are aware of no rule of law which gives to that class of corporations the same rights and privileges that belong to a corporation of a sovereign state.

Sloan Shipyards Corporation v. U. S. S. B. E. F. C., 268 Fed. 624;

Astoria Marine Iron Works v. U. S. S. B. E. F. C., 270 Fed. 635.

Suits can only be maintained against the United States in the courts upon which Congress has conferred such jurisdiction.

Minnesota v. Hitchcock, 185 U. S. 373, 46 Law Ed. 954;

N. P. Railway Co. v. North Dakota, 250 U. S. 135;

Dakota Central Telephone Co. v. State of South Dakota, 250 U. S. 163.

Suit cannot be maintained against the agent of a state without its consent.

Murray v. Wilson Distilling Co., 213 U. S. 151, 53 L. Ed. 742;

Smith v. Reeves, 178 U. S. 436, 44 L. Ed. 1140;
Hagood v. Southern, 117 U. S. 52, 29 L. Ed. 805.

The *Murray v. Wilson Distilling Co., supra*, is in point in this case, in that the State of South Carolina, under its dispensary law, had provided that suits could only be brought against it in state courts, and the Supreme Court held that this was a valid exercise of its sovereign power. It is our contention that when Congress designated the incorporation of the Emergency Fleet Corporation under the laws of the District of Columbia it had in mind the provision that it was suable in the courts of the District of Columbia.

In *Commonwealth Finance Corporation v. Landis*, 261 Fed. 440, cited by defendants in error shows that this case was decided November 7, 1919, that the only law considered by the court in its decision was the Shipping Act of 1916, yet we find

> "The Fleet Corporation may be acting as such agent of the United States, or may not be so acting, or it may so act in some of its activities, and not in others. It follows from this that when it is acting as the United States, and such of its property and assets as are in the actual use of the United States, neither it as such agent nor such property

> can be drawn into or jeopardized by disputes between private parties."

In the present case there is nothing to show, even if we grant the contention of the defendants, that this case at bar does not come within the exception mentioned in the above decision, that the corporation was at that time acting for the United States, on the other hand the complaint so alleges, that it was the money of the United States that was paid.

In *Gould Coupler Co. v. U. S. S. B. E. F. C.*, 261 Fed. 716, decided December 9, 1919, the basis of that decision was the Shipping Act of 1916; and as we read it, the principal ground upon which it was decided was that under that Act the ships of the Fleet Corporation were subject to arrest.

By the Act of Congress of March 3, 1920, known as the Suits in Admiralty Act, this provision is repealed and provides:

> "That no vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such

> corporation, shall hereafter, in view of the provision herein made for a libel *in personam*, be subject to arrest or siezure by judicial process in the United States or its possessions: *Provided*, That this Act shall not apply to the Panama Railroad Company."

So that this opinion is of no value here.

In *American Cotton Oil Co. v. U. S. S. B. E. F. C.*, 270 Fed. 296, the question here presented was not considered, nor was the Merchant Marine Act of 1920, or any of the acts subsequent to the Shipping Act of 1916, although decided January 15, 1921, but the court does express its doubt as to whether the property of the corporation could be sold on execution.

In *Lord & Burnham Co. v. U. S. S. B. E. F. C.*, 265 Fed. 955, decided April 27, 1920, the Act of June 5, 1920, was not considered.

In *Pope v. U. S. S. B. E. F. C.*, 269 Fed. 319, decided April 15, 1915, the court grounds its decision on the *Salas* case, 234 Fed. 842, and refused to follow the *Ballaine* case, 259 Fed. 183, decided by this court.

In *Federal Sugar Refining Co. v. United States Sugar Equalization Board*, 268 Fed. 575, was a corporation that was formed not even by express

direction of Congress so that the principles laid down there would not apply to this case.

In *Perna v. U. S. S. B. E. F. C.* 266 Fed. 896, the court bases its decision on the *Gould Coupler Co.* case, *supra, and the Employer's Liability Corporation* case, 261 Fed. 716, both of which decisions were rendered under the Shipping Act of 1916.

In the *Matter of the Eastern Shore Shipbuilding Corporation, Bankrupt,* the opinion by the Circuit Court of Appeals, 2d Circuit, decided June 15, 1921, is an opinion which does not discuss the question involved in this case, except that it holds that the Emergency Fleet Corporation was an industrial corporation. One of the basic grounds for this decision was that the corporation, organized under the National Bank Act, does not become immune from suit by reason of the fact that it is an agent of the Government. We might add that Congress specifically provided that a national bank could be sued, but only in Federal Courts.

It will be thus seen that all of the above cases which were cited by defendants in error were decided only with reference to the Shipping Act of 1916. They all lose sight of the fact that this corporation was not organized until April 16, 1917,

after the United States entered the war. In this connection, we also desire to call attention that Congress in the original Act provided that within five years after the war was over this corporation should be dissolved — a strange provision if an industrial corporation organized, as defendants in error would have us believe, for profit. This Act also provides that this corporation shall report to Congress.

We have already quoted in our opening brief from the Shipping Act and the Merchant Marine Act to show that it was the declared intention of Congress to form a naval auxiliary and naval reserve as part of the national defense.

An examination of the Acts of Congress subsequent to 1916 dealing with the Merchant Marine strengthens our contention that it was the intention of Congress that the Emergency Fleet Corporation was to be a governmental arm or agent.

The Suits in Admiralty Act of March 9, 1920, provided that no vessel of which the United States is the owner or in which the United States or its representatives owns the entire capital stock, shall be subject to arrest and seizure, Section 9 of the original act having provided that they should be

subject to the same laws as private vessels. This statute was not in effect at the time of the controversy which arose out of the *Lake Monroe Case*, 250 U. S. 246, 63 L. Ed. 962.

The Emergency Shipping Act of June 15, 1917, empowered the President, among other things to buy, contract, equip and operate ships, and authorized the President to use any agent or agency as he might determine from time to time, and authorized the Emergency Fleet Corporation to spend any money turned over to it. By Executive Order of July 11, 1917, the President designated the Shipping Board and the Emergency Fleet Corporation to exercise the power conferred upon him in this Act.

The Act of April 22, 1918, provided the method by which the United States should declare and pay for transportation facilities around shipyards, and authorized the President to exercise the power and authority therein given through such agency as he might determine. This authority was delegated to the Emergency Fleet Corporation by Executive Orders of June 18, 1918, and December 3, 1918.

The Emergency Fleet Corporation was also dele-

gated by the President to carry out the provisions of the Emergency Shipping Fund Act of Congress of November 4, 1918, one of the provisions of which was that the War Department should not be charged for charter hire of vessels.

The Act of March 1, 1918, known as the Housing Law appropriated fifty million dollars to the Emergency Fleet Corporation for the housing and caring for employees of shipyards in which ships of the United States were being constructed.

The Act of July 11, 1918, empowered the Emergency Fleet Corporation to condemn property for use in ships of the United States.

By Executive Order of August 11, 1919, the Emergency Fleet Corporation was delegated by the President, under the Sundry Civil Expenses Act of July 19, 1919, to dispose of "material" and "plant."

The Urgent Efficiency Act for the year ending June 30, 1918, provided that the Emergency Fleet Corporation should be considered a government establishment.

Congress, by the Act of October 23, 1918, amended Section 35 of the Criminal Code so as to include theft of property from any corporation in which the United States holds stock, which amend-

ment was not in force at the time the *Strange* case was tried in the lower court and the Supreme Court did not consider it when it rendered the decision.

We do not believe that anyone can read the various Acts of Congress from the Shipping Act of 1916 on, and successfully contend that the Fleet Corporation is engaged in a purely commercial venture, a business proposition, and not a governmental agency. The whole scope of its activities is surrounded by and interwoven in functions which could only be formed by the United States.

Taking up the Merchant Marine Act, we find by Section 4 that all vessels and other property or interests of whatsoever kind, including vessels and property in course of construction or contracted for, under the various acts of Congress, are transferred to the Shipping Board; and we find by Section 2 the repeal of all the Acts above quoted. Section 14 provides that all money realized from the sale of all these various kinds of property should be turned into the Treasury of the United States. Subdivision (c) of Section 2 also provides that the Shipping Board shall adjust, settle and liquidate all matters, but reserves the right for any

party dissatisfied with any decision of the Board to have the same right to sue the United States.

In conclusion, we call attention of the Court to the fact that the complaint alleges that this money was paid by the United States, and that there is nothing in the record to indicate that the transactions involved were not purely governmental transactions, and that the cases of *Sloan Shipyards Corporation v. U. S. S. B., supra,* in which decision Judge Cushman concurred with Judge Neterer; *Astoria Marine Iron Works v. U. S. S. B., supra; Keely v. Kerr,* 270 Fed. 374; and *Ballaine v. Alaska Northern Railway,* 259 Fed. 183; correctly state the law; and that the judgment of the lower court should be reversed.

Respectfully submitted,

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